Nos. 18-1654 & 18-1782

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

FIRSTENERGY GENERATION, LLC,
Petitioner/Cross-Respondent,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

PETITION FOR REVIEW OF THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD IN *FIRSTENERGY GENERATION, LLC, A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP., AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 272, AFL-CIO*, CASE NOS. 06–CA–163303 AND 06–CA–170901, REPORTED AT 366 NLRB NO. 87

REPLY IN SUPPORT OF BRIEF OF PETITIONER/CROSS-RESPONDENT

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INTRODUCTION

In its Brief, the Board fails to do the one thing that it must—show that its decision finding that the Company violated the Act was reasonable and based on substantial evidence in the record.

First, it fails to support the plain English meaning of the words "inextricably intertwined" as any reasonable person would understand it. Indeed, the Board ignores evidence which plainly shows the Company acted properly in implementing its operational proposals after lawfully reaching impasse, but not a separate and distinct wage proposal contingent on ratification of a new CBA. Simply put, the two proposals put forth by FirstEnergy in 2015 had nothing to do with each other. Accordingly, they were not "inextricably intertwined" and FirstEnergy could permissibly implement retiree health care and not the wage proposals without violating the Act.

The Board similarly ignores evidence that the Company's decision to subcontract certain work for the Outage was not based on labor costs, but on considerations regarding the ability of the Bruce Mansfield Plant to continue operating during the Outage. Thus, FirstEnergy was not required to bargain over the subcontracting work, and even if it was, the Union never sought to bargain. Accordingly, the Court should grant FirstEnergy's petition for review and the Board's Order should not be enforced.

ARGUMENT

A. No Reasonable Mind Could Find the Wage Package was "Inextricably Intertwined" with Retiree Health Care Benefits based on the Record Evidence

In its Brief, the Board argues that substantial evidence supports its finding that FirstEnergy directly tied various wage increases to the elimination of retiree health care, which led the Union to reasonably understand that such proposals were "inextricably intertwined." The Board is flatly wrong. Indeed, the administrative record is replete with evidence which plainly demonstrates that both FirstEnergy and the Union understood that the proposed wage increases were entirely separate from the elimination of retiree health care.

As a threshold issue, the Board wrongly attempts to tie a round of bargaining from December 2014, when the parties discussed various proposals to end retiree health benefits by December 31, 2014, with a new round of negotiations that commenced in July 2015. Simply put, the Union's rejection of FirstEnergy's proposals in December 2014 cut off any link to future negotiations because the 2014 proposals were explicitly conditioned on retiree health benefits ending on December 31, 2014.[1]

[1] In any event, and contrary to the Board's assertion that the Union reasonably believed in December 2014 that the wage increases and retiree health care were inextricably intertwined, the record evidence actually shows just the opposite—that the Union considered the two proposals completely separate. As the Union's chief negotiator told FirstEnergy: "You understand the distinction between benefits,

The complete severance of the 2014 proposals from future negotiations is fully supported by the record evidence. In his notes regarding the July 21, 2015 meeting with then-Union President Herman Marshman, Charles Cookson, FirstEnergy's Executive Director of Labor Relations and Safety, explained that he had provided to Marshman a new set of "proposals that revised certain portions of the previous comprehensive proposal [the "First Comprehensive Offer"] given the union in September 2014." (AP Vol. II, p. 572.) He also explained that "any remaining provisions [in the First Comprehensive Offer] that are not amended are in place still as active proposals." (AP Vol. II, p. 572.)

Among the new proposals presented by Cookson on July 21, 2015, was an equity adjustment to increase wages by $1 per hour (effective up on ratification), a General Wage Increase ("GWI") of 5.5% upon ratification and an additional 2% one year after ratification, and several operational objectives that FirstEnergy sought to achieve through negotiations. A side-by-side comparison shows that, unlike the 2014 proposals, the equity adjustment and GWI increase in the 2015 proposals were untethered to any change in retiree health care:

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wages and compensation. We consider this benefit for the subsidies for healthcare, as separate from wages. … Our position is that the company should provide some compensation for the loss of that benefit." (AP Vol. II, p. 590.)

Summary of 2014 Proposals	Summary of 2015 Proposals
• GWI - Current proposal provides: o 1.5% at ratification, 1.0% one year after ratification and 1.0% two years after ratification o FE offered the following 12/8/14 (timing same as above) ▪ Retiree Medical Box ends 12/31/14 (3.0%, 2.5% and 2.5%) ▪ Retiree Medical Box ends 12/31/15 (2.5%, 2.0% and 2.0%) • Equity Adjustment — $.75 per hour for all classifications at ratification • Benefits o End Retiree Medical Box — 12/31/14 or 12/31/15 (see above) o Cash Balance Pension Plan for new hires (Now after 1/1/16) o Update Medical plans in agreement to reflect current FE medical plans o $500/$1,000 contribution to HSA or 401K for active employees year after end of retiree medical (now 2016) • Operational objectives o Eliminate work location restrictions o Restore ability for in house Dr. examinations & requirements for Drs. Slips o Elimination of vacation banking • Safety Manual updated by adding Amendment 1 (AP Vol. II, p. 567.)	• Equity Adjustment — $1.00 per hour for all classifications effective at ratification • GWI o 5.5% at ratification and 2.0% one year after ratification • Benefits (Key Points) o End Retiree Medical Box October 31, 2015 o Cash Balance Pension Plan for new hires on or after January 1, 2016 o $500/$1,000 annual contribution to HSA or 401K for active employees only; to begin 2016 (2016 Plan year) • Operational objectives o Expanded Resource Sharing - flexibility to assign employees to work in other generation, utility and Company within FE ▪ Ability to direct employees to work at other FE locations within 100 driving miles of Bruce Mansfield (Generation or Utilities) ▪ Employees paid appropriate mileage and per diems (IRS Conus tables) when assigned ▪ Amend Severance Policy to clarify that resource sharing assignment does not fall within the severance policy o Maintenance flexibility ▪ Expanded ability to utilize mobile maintenance employees at Bruce Mansfield ▪ Create lower level "B" occupations in Mechanical and Electrical • Safety Manual o Bruce Mansfield employees utilize the FE Generation safety manual which may be amended from time to time by the Company o Amendment 1 as previously proposed (Red Book to Yellow Safety Manuel) [sic] o Amendment 2 (moving from Yellow Safety Manuel to Buff Manuel) [sic] (AP Vol. III, p. 940.)

Next, the Board argues that FirstEnergy tied the equity adjustment and GWI proposals to the elimination of retiree health care as a *quid pro quo* in its 2015 proposals to the Union. No reasonable reading of the record supports such an interpretation. Even the Union understood no *quid pro quo* existed. During their July 21, 2015 meeting, Marshman told Cookson: "Retiree health care must go to

2017. Also need a 12% equity and 3% at ratification (total of 15%). Employees feel they need to be recognized. The Company has benefited from all of the lost wages." (AP Vol. II, p. 574.) This statement is plain and cannot be twisted by the Board away from its straightforward meaning. Had Marshman believed that the equity adjustment and GWI proposals were "inextricably intertwined" with retiree health care, as the Board suggests, he would have provided a global counterproposal that included all parts of the *quid pro quo*. Here, he flatly rejected any change to retiree health care but still insisted on an increase in the wage proposals.

Further cementing the fact that no *quid pro quo* existed, during the parties' final negotiating session on September 18, 2015, Marshman told Cookson that he did not want wages merely to be "close" to what employees earned at FirstEnergy's Sammis Plant; rather, he said, "I want to be at or above Sammis." If the new equity adjustment and GWI proposals were directly tied to retiree health care, then it would make no difference whether they were also "close" to wages at the Sammis Plant. Marshman plainly understood the singular purpose of the new equity adjustment and GWI proposals—to get the BMP Union paid the same as the Sammis Union.

Thus, in no possible way can it be said that FirstEnergy and the Union understood that FirstEnergy's 2015 proposals directly tied wage increases to the

elimination of retiree health care. Rather, FirstEnergy and the Union both understood the opposite to be true, that one had nothing to do with the other.[2] Thus, it would be wholly unreasonable for the Board to conclude otherwise. The wage proposals and retiree health care were not "inextricably intertwined" in 2015.

B. The Board Wrongly Relied on *Plainville Ready Mix*, as the Equity Adjustment and GWI Proposals were not 'In Lieu Of' the Elimination of Retiree Health Care

As stated in the Company's primary brief, the bedrock principle, from decades of Board precedent, is that an employer may choose to implement some but not all of its pre-impasse proposal. There is a limited exception, from less than a small handful of cases, in which the Board held when certain proposals were "inextricably intertwined" with other proposals, then both those proposals must be implemented together. "Inextricably intertwined" means exactly what it sounds like—that two proposals are so reciprocal or contingent upon one another, that one cannot be understood or contemplated without the other.

This is the tall order the Board was obligated to show, and in more than fifty

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[2] The Board also argues that even if the wage proposals were also intended to get the unit employee's wages "close" to Sammis, that does not alter the conclusion that that the wage increases were also a *quid pro quo* for retiree health care. The Board cites absolutely no case law in support of its proposition nor does it's proposition pass the smell test. *Quid pro quo* is a binary proposition — "A" for "B". Once the offer is expanded to include additional conditions, the binary nature of *quid pro quo* falls apart. In other words, either wage proposals were offered solely in return for retiree health care or they were not. The Board cannot have it both ways.

pages of argument, the Board is no better off than it was before.

In fact, the Board argues that it correctly applied *Plainville Ready Mix Concrete Co.*, 309 NLRB 581 (1192), *enforced* 44 F.3d 1320 (6th Cir. 1995), to find that the equity adjustment and GWI proposals were "inextricably intertwined" with the proposal to eliminate retiree health care, given what it calls the "striking" similarities between the cases. So, far from there being a "striking" resemblance, the key facts in that case—the facts upon which the case turned—are entirely absent here, and directly in the opposite direction.

Whatever the weight this Court wishes to attach to that case, a clear reading of *Plainville Ready Mix* shows it has no application to the facts here. Here, there was no *quid pro quo* that involved the equity adjustment and GWI proposals, on the one hand, and retiree health care, on the other hand. They were not even linked in the slightest.

In *Plainville Ready Mix*, the employer provided a final offer to increase hourly wages from $9.50 to $10.25 over a term of years in return for eliminating gain sharing and incentive pay.[3] *Id.*, at 1325. After the parties reached impasse,

[3] The final pre-impasse offer in *Plainville Ready Mix* also included provisions to implement additional costs and plan limitations to the employer's health insurance plan in return for providing additional employee benefits related to the insurance. *Plainville Ready Mix*, 44 F.3d at 1325. Significantly, this Court considered the insurance-related proposals separately from the wage issue even though they were banded together by the employer in its final pre-impasse offer. *Id.*, at 1334. The clear import of this decision is that the Board cannot demonstrate that certain terms

the employer sent a letter to unit employees explaining that "the Union's 'primary concerns' were a 'fixed wage increase' *in lieu of* gain sharing and incentive pay." *Id.* (emphasis in the original, and specifically highlighted by this Court in its Decision). Nonetheless, when the employer implemented portions of its final offer after impasse, it kept hourly wages at $9.50 but eliminated gain sharing and incentive pay. *Id.*

As this Court stated, the issue was whether the employer presented its final offer prior to impasse "as a comprehensive, integrated whole, which the Union 'reasonably comprehended' would be implemented in its entirety, or as separate items, which the Union 'reasonably comprehended' could be implemented separately, *i.e.*, that the gain sharing and incentive pay plans would be eliminated, but there would be no increase in the fixed hourly wage rate." *Id.*, at 1326. In other words, the Union had to understand that the employer's final offer was an all or nothing proposition prior to implementation. If the Union understood that even one part of the proposal **could** be implemented separately after impasse, then the parts of the proposal were not "inextricably intertwined" and the employer was entitled to implement those portions separately.

In finding the Board met its burden in that case, this Court relied upon

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were "inextricably intertwined" simply because FirstEnergy included them in the Second Comprehensive Offer to the Union. It must show that there was an actual *quid pro quo* specifically related to the terms.

strong, unequivocal evidence, including **1**) testimony of the Union's negotiator, who testified that the "proposed wage plan" was always presented as a "total package deal" and the employer "never discussed dropping the gain sharing and incentive pay plans without also discussing a concomitant raise in the fixed hourly wage rate." *Id.*, at 1328-29; **2**) the employer's letter to Union members regarding the final pre-impasse offer, noting, "Nowhere in this letter did the Company give notice to the Union that it was contemplating keeping the fixed hourly wage rate at $9.50 per hour at the same time as dropping incentive pay." *Id*., at 1329 (emphasis in original); and **3**) the Stipulation of Facts from the parties stating that "[t]he higher wage rate proposal was offered by the Employer in conjunction with a proposal to eliminate the gain sharing and incentive pay plans implemented on March 7, 1988." *Id.*, at 1330 ("We believe the words '*in conjunction* with' indicate that the Company was offering an integrated economic package . . . .").

None of this is even remotely within the same ballpark as the case here. For one obvious distinction—the Union's Chief Negotiator, Marshman, was prevented by the Board from testifying. (But revealingly, on the secondary subcontracting issue he was called to testify.) Thus, any interpretation suggested by the Board as to the Union's understanding of the final pre-impasse offer is nothing more than guesswork—speculative at best, and (as the balance of the facts make clear) almost certainly false.

Further, and again unlike *Plainville Ready Mix*, there is nothing in the record evidence that comes close to suggesting that FirstEnergy presented the equity adjustment, GWI, and retiree healthcare in 2015 as a "total package." Indeed, the record shows that the equity adjustment and GWI were completely separate from the 2015 retiree health care proposal, which was specifically tied to the $500/$1,000 increase to the unit employees' HSAs and 401(k)s. Moreover, unlike the employer in *Plainville Ready Mix*, the Company here at all times—prior to, during, and after the Second Comprehensive Offer—always told the Union that any equity adjustment or GWI was specifically contingent upon ratification. No one ever dreamed the Company would implement the equity adjustment or GWI without ratification of a new CBA.

Finally, and just as significant, unlike *Plainville Ready Mix*, FirstEnergy has never stipulated that the wage proposals were offered in conjunction with retiree health care. Indeed, FirstEnergy has consistently maintained that the two are entirely separate.[4]

[4] While the Board takes issue with FirstEnergy's use of the phrase "in lieu of," the phrase itself was repeatedly emphasized by this Court in *Plainville Ready Mix* and, more importantly, its meaning was vigorously applied by the Court. To be considered "inextricably intertwined" the parts of the final offer must be presented as a *quid pro quo* such that the sum of the parts would be implemented or none of them would be implemented. The facts here do not come close to meeting this standard. It was always contemplated by the parties that the equity adjustment and GWI was contingent on ratification of the CBA. There was no such tie to the 2015 retiree health care proposal. Rather that was tied solely to the $500/$1,000

Every one of these distinctions should be independently sufficient to distinguish the high burden the Board met in *Plainville Ready Mix* from this case. Taken together, it becomes impossible to defend the finding that the operational proposals, and the cash inducement for a ratified contract, were somehow "inextricably intertwined."

Plainville Ready Mix was the single and sole case the Board relied upon in its short decision. It is this worthwhile noting that this Court therein also surveyed a number of cases in which courts found final proposals were not "inextricably intertwined" and the employer was permitted to implement some but not all of its proposals after impasse. FirstEnergy's implementation of retiree health care falls squarely in line with those cases. In *Presto Casting Co*., 26 NLRB 346, 354-55 (1982), for example, the Board held that the employer's implementation of proposed wage increases, classification, and grade selections did not violate the Act even though it did not implement the benefits portion of the final offer. As this Court noted, *Presto* held the Act was not violated because the "employer implemented the entire wage proposal offer it had proposed during negotiations." *Id.*, at 1336. This type of implementation is dispositive, the Court held. "In cases which involve the implementation of only a portion or portions of the final

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contribution to the HSA or 401(k), and certainly could have been, and was, implemented separate from the wage proposals.

proposal for a collective bargaining agreement, the employers did not implement only the negative portions of a separate component of the final proposal, such as a wage plan, health plan, or pension benefit plan, . . . but implemented, for example, the wage plan, but not the benefit plan." *Id.*, at 1336.

That is exactly what FirstEnergy did here. It implemented the entire 2015 proposal related to retiree health care, which eliminated in-the-box benefits in return for contributions of $500/$1,000 to unit employees' HSAs or 401(k)s, but not the separate wage proposals that were contingent on ratification. In other words, the Company implemented both the negative and positive portions of the retiree health care proposal, which is entirely permissible. It would be wholly unreasonable to find differently.

C. The Board Unreasonably Held that FirstEnergy's Decision to Subcontract Outage Work was a Mandatory Subject of Bargaining

In its Brief, the Board argues that FirstEnergy's decision to subcontract work for the Outage was a mandatory subject of bargaining because the subcontractors replaced the unit employees and performed the same work in the same way the unit employees had in the past. The Board's wooden application of *Torrington Industries, Inc.*, 307 NLRB 809 (1992) and its progeny is wholly unavailing. First, the Board ignores direct evidence in the record that the subcontracting work cost the Company as much as $3 million or more to do the same work unit employees

had in the past. Thus, labor costs had nothing to do with FirstEnergy's decision and it was not required to bargain as a result. Second, the cases relied on by the Board are distinguishable on their face, as none of the unit employees were laid off or otherwise affected by FirstEnergy's subcontracting decision.

In *Torrington Industries*, the employer laid off unit employees and replaced them with subcontractors without providing adequate notice to the union or affording the union an opportunity to bargain about the decision and its effects. The Board found that the employer's reasons for its subcontracting "were not matters of core entrepreneurial concern and outside the scope of bargaining" because the employer "simply replaced the two employees hauling sand and stone with a non-unit employee and independent contractors, also hauling sand and stone." *Id.*, at 810. The Board noted, however, that "there may be cases in which the nonlabor-cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining." *Id.* Finally, the Board stated that it was "not fashioning a *per se* rule that any subcontracting decision that does not involve a significant change in scope and direction of the enterprise is a mandatory subject of bargaining." *Id.* at 811.

Thus, it is clear that not every decision to subcontract work is the subject of mandatory bargaining. The decision must be conditioned, in whole or in part, upon labor costs. The Board completely ignores this principle.

Moreover, the Board fails to address, let alone distinguish, the numerous cases cited by FirstEnergy which plainly establish that not every subcontracting decision must be bargained over. In *Oklahoma Fixture Co.*, 314 NLRB 958, 959 (1994),[5] for example, the Board held that the employer was not required to bargain over electrical subcontracting work because the employer "was concerned about legal liability and the risk of losing virtually all [its] revenue in the event of electrical damage … resulting from an improperly wired fixture." *Id.*, at 960. As the Board held:

> "Labor costs," even in the broad sense of the term employed by the Board, were not a factor in the decision. … [W]e find that it involved considerations of corporate strategy fundamental to preservation of the enterprise. We further find that the Union had no authority or even potential control over the basis for the decision. Therefore, we conclude that the subcontracting decision was outside the scope of mandatory bargaining and that the Respondent's failure to bargain over it did not violate Section 8(a)(5) and (1) of the Act.

Id. Thus, decisions based on factors other than labor costs plainly remove an employer's obligation to bargain. That is exactly the case here. FirstEnergy's

[5] *See, also, First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981) (subcontracting not a mandatory bargaining subject where employer's decision was motivated by a need to fill orders and "maintain a healthy, viable business," and such decision did not change the company's "scope and direction" or adversely impact the bargaining unit); *Furniture Rentors of Am., Inc. v. NLRB*, 36 F.3d 1240 (3d Cir. 1994) (holding employer was not required to bargain over subcontracting because decision was based on lower than expected productivity, unacceptable damage to furniture, complaints by customers, and employee theft rather than labor costs).

decision to subcontract the work was based on its need to keep Units 2 and 3 operational during the Outage and to take advantage of the warranty offered by GE that FirstEnergy could not otherwise obtain.

Astonishingly, the Board also argues its finding that the decision to subcontract "was based, at least in part, on labor costs" was reasonable given that FirstEnergy failed to introduce evidence that subcontracting was more expensive than using unit employees. But a September 10, 2015, memo discussing the Outage and the cost to perform the open/clean/close ("OCC") functions normally done by unit employees plainly shows that it cost FirstEnergy an additional $3 million to perform the OCC function. (AP Vol. II, p. 608.) Specifically, the memo states, "The GE proposal to perform the OCC labor was revisited and an additional $1.5M Capital and $1.5M in O&M would be needed to pay GE to perform the OCC labor." (AP Vol. II, p. 608.) Thus, there can be no doubt that using the subcontractor was more expensive than using unit employees, and the Board's finding that the decision was based in any way on labor costs is wholly unreasonable. Accordingly, as was the case in *Oklahoma Fixture*, FirstEnergy had no duty to bargain over the subcontracting decision.

D. The Board's Finding that the Subcontracting Work was a *Fait Accompli* was Unreasonable when the Union had More than a Month to Bargain, had it so Requested

Finally, the Board argues that FirstEnergy did not provide what it calls

"sufficient" notice of the subcontracting work, and that the Union did not waive bargaining because FirstEnergy's announcement of the subcontracting work was presented as a *fait accompli*. What does "sufficient" mean? The Board has never told anyone. While an employer must provide sufficient advance notice to afford a reasonable opportunity to bargain, there is no bright line rule on how much notice is enough. *NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1036 (10th Cir. 1996). As the Tenth Circuit noted, "the discrepancy seems to stem in part from the underlying factual situations in the cases; the cases seem to turn on whether the employer 'refused to bargain' rather than the amount of prior notice." *Id.* (holding that four days' notice was sufficient considering the short-term nature of the electricians' employment and the nature of the decision to subcontract work).

"*Refused to bargain*" is the critical phrase. Here, FirstEnergy provided the Union, at the very least, more than a month's notice that it was subcontracting out the OCC work to GE. The Company was already engaged in numerous bargaining activities, as the record showed. Had the Union but asked, the Company would have bargained over this item too. The fact is, the Union had ample time to make the request; it simply never bothered to do so. Not surprising—indeed, this is in keeping with this very Union's track record, as this Court made clear in *Ohio Edison Co. v. NLRB*, 847 F.3d 806 (6th Cir. 2017). FirstEnergy was under no obligation to offer bargaining on its own accord.

Perhaps aware of this fatal flaw, the Board argues that the Union was still under no duty to request bargaining because FirstEnergy's subcontracting announcement was presented as a *fait accompli*. Not so. While FirstEnergy was negotiating with GE for more than a year regarding the scope of work to be completed on the Outage, there is no question that a final decision was not made until November 13, 2015, when the purchase order was issued. Even then, the record evidence plainly demonstrates that FirstEnergy was willing, and actually did, in fact, change the scope of work after the purchase order was issued. Specifically, FirstEnergy altered the purchase order so that unit employees could perform the boiler feed pump work after its discussion with the Union in February 2016. While the Board discounts this change to the purchase order, calling it a "change to one small component of the subcontracted work," it points to no evidence in the record that FirstEnergy was bound by the purchase order related to the OCC work. Indeed, the only evidence cited demonstrates that FirstEnergy was capable and willing to revise the scope of the purchase order as needed.

Finally, while the Board attempts to focus on the steps FirstEnergy took prior to announcing the subcontracting work, it fails to provide any evidence that the Union ever subjectively believed there was no reason to request bargaining. Accordingly, FirstEnergy provided adequate notice to the Union about the subcontracting work and, because it never requested to bargain over the work, the

Union affirmatively waived any right to do so.

CONCLUSION

Based on the foregoing, as well as the reasoning more fully argued in the FirstEnergy's Brief, which is hereby incorporated herein, the Board's decision in its Order is not supported by substantial evidence. Accordingly, FirstEnergy's petition for review should be granted and the Board's Order should not be enforced.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure and Sixth Circuit Rule 32(a), the undersigned counsel certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 4,568 words excluding the parts of the brief exempted by Fed. R App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared using Microsoft Word 2010 for Windows in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

A copy of the foregoing was filed electronically on the 14th day of January 2019 and served according to the Court's Electronic Filing guidelines.

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